U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 July 2003

CASE NO.: 2003-AIR-26

In the Matter of

JOHN SWINT
Complainant
v.

NET JETS AVIATION, INC.
Respondent

RULING AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

FACTUAL AND PROCEDURAL HISTORY

On January 2, 2003, Complainant John Swint filed a complaint with Region V of the United States Department of Labor's Occupational Safety & Health Administration (OSHA), which alleged his employer, Respondent Net Jets Aviation, Inc., violated the employee protection or "whisteblower" provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 42121 *et seq.*[1] On January 16, 2003 Net Jets filed a position statement with Region V denying Swint's allegations and setting forth the company's view of the reasoning behind Swint's termination.[2] OSHA's findings dismissed Swint's complaint stating that there were no reasonable causes to believe that Net Jets had violated the Act.[3]

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[1] Swint's complaint alleged that he was terminated for having voiced safety concerns in regards to being too fatigued to work. The Complaint cites the date of discrimination as October 20, 2003. Swint further contended that he had voiced aircraft safety concerns in the past, which also contributed to his termination.

[2] In its position statement, Net Jets contended that Swint had not engaged in any protected activity and could not establish a *prima facie* case under AIR 21. Further, Net Jets contended that Swint was terminated for having violated certain provisions of the Collective Bargaining Agreement and the Flightcrew Manual. Net Jets advised that Swint was never informed on October 22, 2002 that he would operate an aircraft or engage in any safety sensitive duties on that day. As a result, Net Jets contended that it was impossible for Swint to voice a safety concern in regards to his activities that date.

[3] OSHA's Region V Area Director noted that "evidence could not substantiate that the complainant was discharged because he had voiced safety concerns." The findings also stated that OSHA's investigation showed that although Swint claimed he was discharged because of his refusal to operate an aircraft citing fatigue, Net Jets had not yet given Swint an assignment to operate an aircraft on that day.

Swint received OSHA's findings on March 14, 2003 via certified mail. In a letter dated April 14, 2003, Swint objected to OSHA's findings and requested a hearing. Swint's letter was postmarked April 15, 2003. On May 2, 2003, the undersigned issued a Notice of Hearing and Pre Hearing Order, which preliminarily set August 5, 2003 as the hearing date in the present matter. The hearing was later delayed to September 9, 2003.

Summary of Arguments

On May 28, 2003, the undersigned received Respondent Net Jet's Motion to Dismiss Complainant's Objections and Request for Hearing. Respondent requests that Swint's objections be deemed untimely and dismissed. Further, Respondent contends that because the objections were untimely, the undersigned lacks subject matter jurisdiction over the claim and Claimant has failed to state a claim upon which relief can be granted.

Pursuant to AIR 21, when a complaint is filed under the employee protection provision, the Secretary of Labor must conduct an investigation and notify the complainant and the person identified in the complaint of the Secretary's findings within sixty (60) days after receipt of the complaint. 49 U.S.C. § 42121 (b)(2)(A). The Secretary, by and through the OSHA's Region V office, satisfied this requirement. The provision of AIR which is the central issue in this case mandates that "[n]ot later than 30 days after the date of notification of findings . . . either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record." 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1979.106(a) (2002). The AIR 21 implementing regulations advise that the date of postmark, facsimile transmittal, or e-mail communication is considered the date of filing. 29 C.F.R. § 1979.106(a). The consequences of failure to timely file an objection and request for hearing result in the preliminary order being deemed a final order and not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1979.106(b)(2).

Respondent interprets AIR21's thirty (30) day filing period as a strict requirement not subject to additional time for mailing. Claimant received OSHA's findings on March 14, 2003. Therefore, according to Respondent, his objections had to have been filed on or before April 14, 2003.[4] Pursuant to the AIR Regulations, the date of filing is determined by the date of postmark. 29 C.F.R. § 1979.106(a). Here, Claimant's objection and request for hearing was postmarked April 15, 2003, thirty-two (32) calender days from the date upon which Claimant received OSHA's findings.

Respondent's Reply to Claimant's Opposition to the Motion to Dismiss reiterated the point that Claimant's objections and request for hearing should be dismissed as untimely because it was not filed within thirty (30) days of receipt of OSHA's findings. Respondent argues that AIR 21 contains specific procedural rules implemented to govern cases under that statute and that Claimant cannot escape their application. *See* 49 U.S.C. §42121(b); 29 C.F.R. § 1979.106(a).

[4] It should be noted that April 14, 2003 was a Sunday.

Respondent further argues that 29 C.F.R. Part 18 *et seq.* (hereinafter ALJ Rules) should not apply to this timeliness consideration under AIR 21 because those rules definitively state that "to the extent these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling." 29 C.F.R. §18.1(a). It is Respondent's contention that the procedures set forth in AIR 21 are plainly inconsistent with 29 C.F.R. Part 18, so that the AIR procedures, alone, should govern this case.

Claimant's Opposition to the Motion to Dismiss argues that the procedures set forth in AIR 21 are not despositive of the timeliness requirement. Claimant further argues that the thirty (30) day time period stated in AIR 21 is not inconsistent with 29 C.F.R. Part 18 *et seq.* Claimant contends that the ALJ Rules clarify the AIR 21 language requiring filing of objections within thirty (30) days of receipt of OSHA's findings. Namely, Claimant points out that neither the statutory language in AIR 21 nor its official comments indicate whether weekends or Federal Holidays shall be included or excluded from the time computation, nor is there any indication as to whether there will be additional time allowed for mailing. Claimant goes on to reject Respondent's proposition that failure to timely file denies the OALJ subject matter jurisdiction by submitting that timely filing is not a jurisdictional prerequisite. Claimant, in the alternative, also argues that equitable tolling should be applied because claimant failed to inform counsel of his receipt of OSHA's findings until March 24, 2003, a full 10 days after having received it and Respondent has not been prejudiced by the delay in filing. Respondent's Reply countered that lack of attentiveness is not grounds for application of the principles of equitable tolling.

ISSUES

Essentially, three issues have been raised by the parties as a consequence of this Motion to Dismiss. Those issues are:

1. Whether 29 C.F.R. §18.4(c)(3) operates to allow five additional days for the mailing of an objection to OSHA's findings pursuant to 49 U.S.C. §42121(b)(2)(A) and the implementing regulations in 29 C.F.R. §1979.107(a), which mandate that objections must be filed within thirty (30) days of receipt of OSHA's findings?

2. Whether timely appeal of OSHA's findings under AIR 21 employee protection provision is a jurisdictional prerequisite?

3. Whether, under the facts of this case, equitable tolling will apply to deem the filing of Claimant's objections timely?

DISCUSSION

1. Application of 29 C.F.R. Part 18 to AIR 21 and its implementing regulations.

Law

Pursuant to AIR 21, "either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record." 49 U.S.C. § 42121(b)(2)(A) (2002); 29 C.F.R §1979.106(a) (2003). The party who desires review "must file objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order." *Id.* If no objections are timely filed, then the "findings or preliminary order, . . . , shall become the final decision of the Secretary, not subject to judicial review." *Id.*

The central issue in this case centers around the language of the Act and implementing regulations and the applicability of 29 C.F.R. Part 18, entitled Rules Procedure for Administrative Hearings Before the Office of Administrative Law Judges (hereinafter ALJ Rules). 29 C.F.R. §1979.106(a) contains regulations implementing AIR 21. That section is entitled Procedure for the Handling of Discrimination Cases under the Aviation Investment Reform Act of the 21st Century. Section 1979.106(a) and its counterpart 42 U.S.C. §42121(b)(2)(A) mandate that objections to the findings and preliminary order must be filed "within" and "not later than" thirty (30) days (respectively) from receipt of the findings and preliminary order.

29 C.F.R. Part 18.1(a) of the ALJ Rules states that "[t]o the extent these rules are *inconsistent* with a rule of special application provided by statute, executive order, or regulation, the *latter is controlling*." As a result, where provisions of the ALJ Rules are inconsistent with the AIR 21 regulations in 29 C.F.R. §1979.106(a), the AIR regulations will control.

To resolve the issue of whether Complainant's objections were timely under AIR 21, both the AIR procedural regulations and the ALJ rules must be addressed and reconciled with one another. The AIR regulations dictate that for the purposes of determining whether an objection and request for hearing was timely filed, the date of postmark is considered the date of filing. 29 C.F.R. §1979.106(a) (2003). Here, the date of postmark was April 15, 2003; thirty-two (32) calender days from the date of receipt of notification of OSHA's findings. Under the ALJ Rules documents are filed when received by the Chief Clerk at the Office of Administrative Law Judges. 29 C.R.F. Part 18.4(c)(1). Therefore, in accordance with ALJ Rule 18.1(a), the AIR regulation is controlling because it is inconsistent with the ALJ Rule. 29 C.F.R. Part 18.1(a).

Next we must consider the thirty (30) day statutory filing period under AIR 21. 49 U.S.C. § 42121(b)(2)(A) (2002); 29 C.F.R §1979.106(a) (2003). Both the Act and the implementing rules state that objections are to be filed "within 30 days" or "not later than 30

days." *Id.* However, neither indicate a method for time computation. AIR 21 does not address, directly or indirectly, exactly how the filing period should be computed. Therefore, nothing in AIR 21 can be characterized as inconsistent with the ALJ Rules. As a result, the ALJ Rules addressing "time computation" in Section 18.4 are appropriate to aid in determining whether the objections were timely filed.

Findings of Fact and Law

In an effort to decide whether Complainant's objections were filed within the statutory period, we must first determine the last day upon which the objections could have been timely filed. Section 18.4(a) of the ALJ Rules instructs that "when computing any period of time under these rules . . . the time begins with the day following the act , . . . , and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government in which case the time period includes the next business day." 29 C.F.R. §18.4(a). Complainant received OSHA's findings on March 14, 2003 and his objections were filed, as determined by the date of postmark, on April 15, 2003. According to Section 18.4(a) the 30 day filing period would have begun on March 15, 2003, which was the day following the date of the triggering "act". Thirty days from March 15 was April 13. However, April 13, 2003 was a Sunday, therefore, Claimant's statutory filing period ended on the next business day, which was April 14, 2003. Claimant was one day late and out of time when he filed the objections on April 15, 2003.

Notwithstanding the above analysis, Complainant contends that 29 C.F.R. §18.4(c)(3) of the ALJ Rules should apply to the statutory filing period in order to allow five (5) additional days for mailing.[5] The purpose of cannons of statutory construction is to discover the true intention of the law. 82 C.J.S. Statutes § 306. However, one must keep in mind that such cannons are to be used only to remove doubt, and never to be used to create doubt as to the meaning of the law. *Id.* The general rule is that words used in a statute should be given their plain and ordinary meaning. 82 C.J.S. Statutes §321.

In the present matter, the Act and implementing regulations definitively state that objections and requests for hearings are to be filed "within 30 days" and "not later than 30 days." 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. §1979.106(a). The plain and rational interpretation of those words is that "30 days" means thirty (30) consecutive days. As the United States Supreme Court advises "[i]n interpreting a statute, a court should always turn to one cardinal cannon before all others . . . [c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. German,* 112 S.Ct. 1146,

[5] 29 C.F.R. § 18.4 (c)(3) states that "[w]henever a party has a right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period."

1149 (1992). In the present matter, the undersigned presumes the plain meaning of "30 days" means thirty (30) consecutive days, including Saturdays and Sundays.

Admittedly, the Act and Regulations do not define how the thirty (30) day filing period should be computed nor does it define what constitutes a "day." However, neither ommission affects what one knows as the plain and ordinary meaning of "30 days." Courts must construe statutes as they find them and must not amend or change them under the guise of construction. 82 C.J.S. Statutes §307. The undersigned may not, through interpretive measures, amend the Act to require a thirty-five (35) day filing period when Congress has decided that the length of the period is thirty (30) days. Furthermore, courts are not permitted to inject into a statute a provision of another independent statute on the theory that there is no substantial reason for its omission. 82 C.J.S. Statutes §307, §351 *et seq.* Consequently, the undersigned cannot, in accordance with cannons of statutory construction, inject certain provision of 29 C.F.R. Part 18 into the Act.

Primarily, Complainant's position relies on *Bodine v. International Total Services*, a decision based upon a Motion to Dismiss for failure to timely file objections under AIR 21. 2001-AIR-00004 (ALJ, November 20, 2001). In *Bodine,* Respondent's objections were not filed until forty (40) calender days after receipt of the findings and were clearly outside of the statutory filing period. *Id.* The court's analysis alluded to the fact that even if Respondent was allowed an additional five days for mailing, the objection would remain untimely. *Id.* Complainant relies on that *dicta* and asks this court to use *Bodine* as authority for the proposition that five (5) additional days for mailing is warranted under AIR 21's thirty (30) day filing period. *See* 49 U.S.C. § 42121(b)(2)(A) (2002); 29 C.F.R §1979.106(a) (2003).

Claimant's reliance on *Bodine* is misplaced. *Bodine* was decided in November 2001. At that time, the AIR 21 implementing regulations had not yet been promulgated. The text of the Act itself, makes no mention of the procedure mandating that the date of postmark be considered the date of filing. *See* 49 U.S.C. § 42121 *et seq.* The interim regulations were released in July 2002 and the final regulations in March 2003, both containing language dictating that the date of postmark is considered date of filing . *See* 29 C.F.R. §1979.106(a). However, the interim and final regulations were promulgated after the decision in *Bodine*. As a result, the rational in *Bodine* Claimant relies on is inapplicable as it not only constitutes *dicta,* but is also based upon underlying law that has since changed.

Seemingly, using the date of postmark to determine date of filing is meant to ameliorate concerns regarding delays occasioned by the United States Postal Service and the harshness of "filed upon receipt" procedures. This is an important point because it appears that those are the same concerns that the "five additional days" rule seeks to remedy. *See* 29 C.F.R. §1979.106(a). Consequently, the provision of the AIR regulations mandating that the date of postmark is considered the date of filing addresses the same ills as the "five additional days rule" in 29 C.F.R. § 18.4(c)(3). Although the two provisions employ different means, the ends sought are

equivalent. As a result, the provisions are explicitly inconsistent and the AIR 21 regulations are controlling. *See* 29 C.F.R. § 18.4(a)(1).

Furthermore, the concept in *Bodine* that Claimant relies on is nothing more than *dictum* as the use of five additional days for mailing did not change the outcome of that case.[6] Regardless of whether the five additional days were added to the statutory filing period, Respondent in *Bodine* remained outside of the filing period. Other whistleblower cases that have employed the five additional days for mailing rule pursuant to 29 C.F.R. § 18.4(c)(3) can be differentiated from the present matter because in those cases, the actual date upon which the objecting party received notice was unascertainable. For example, in *Staskelunas*, where complainant failed to timely appeal OSHA's determination under the whistleblower provision of the Energy Reorganization Act of 1974, there was no indication in the record of when complainant had actually received the notice. 1998-ERA-8 (ALJ, December 15, 1997) *aff'd* (ARB, May 4, 1998). Therefore, the ALJ applied the §18.4(c)(3) rule to deem notice received on the fifth day after it was mailed. *Id.* Analogously, in *Crosier v. Westinghouse Hanford Company,* it was stated that "[s]ince the record did not reflect the date of actual receipt of the notice determination, I applied the 'mailing rule' and deemed the notice received on the fifth day after it was mailed." 1992-CAA-3 (Sec'y, December 8, 1994). In the present matter, the date upon which claimant received OSHA's findings is definitively known and documented by the certified mail return receipt.

Complainant's argument that Part 18.4(c)(3) of the ALJ Rules allowing five additional days should apply to the statutory filing period under AIR 21 and its regulations is contrary to a stated policy of AIR 21 indicating that the implemented procedures, including the thirty (30) day statutory filing period, were included for the "expeditious handling of complaints made by employees, or by persons acting on their behalf." 29 C.F.R. §1979.106(a). Essentially, Complainant's argument favoring application of five additional days for mailing is not supported by the language of the Act, cannons of statutory construction, case law, or the stated policy of the employee protection provision.

2. Subject Matter Jurisdiction

Law

Respondent, in its Motion to Dismiss, requests that Claimant's objection and request for hearing be dismissed on the theory that, because the objections were not timely filed, the Office of the Administrative Law Judges is denied subject matter jurisdiction. Under various employee protection provisions, the rule is that the time limit for filing a request for a hearing is not a jurisdictional requirement. *Shelton v. Oak Ridge National Laboratories,* 1995-CAA-19 (ARB

[6] Dictum is defined as "[a] view expressed by a judge in an opinion on a point not necessarily arising from or involved in a case or necessary for determining the rights of the parties involved." MERRIAM WEBSTER'S DICTIONARY OF LAW, Merriam-Webster, Incorporated. 1996.

March 30, 2001) (stating that "[b]oth the Secretary and this Board have held that the time limit for filing a request for a hearing is not a jurisdictional prerequisite.")(citing *Crosier v. Westinghouse Hanford Company*, 1992-CAA-3 (Sec'y, January 12, 1994); *Degostin v. Bartlett Nuclear, Inc.*, 1998-ERA-7 (ARB, May 4, 1998); *Staskelunas v. Northeast Utilities Company*, 1998-ERA-8 (ARB, May 4, 1998)).

Spearman v. Roadway Express, Inc., dealt with the employee protection provision of the Surface Transportation Act of 1982, where the Secretary overruled the presiding ALJ's Recommended Decision and Order of Dismissal (RD&O). 1992-STA-1 (Sec'y, August 5, 1992). The RD&O concluded that dismissal was required because the OALJ lacked jurisdiction over the claim as a result of Complainant's failure to timely file objections to OSHA's findings. *Id.* The Secretary disagreed and advised that previous cases involving employee protection provisions of STAA and environmental laws established that filing periods are to be treated as Statutes of Limitations, rather than a jurisdictional bar. *Id.* See, e.g., *Smith v. Specialized Transportation Services*, 1991-STA-22 (Sec'y, November 20, 1991); *Ward v. Bechtel Construction, Inc.*, 85-ERA-9 (Sec'y, July 11, 1986). Further, under the Toxic Substances Control Act, the thirty (30) day filing period for a complaint with the Secretary of Labor alleging discrimination for having engaged in protected activity was held not to be jurisdictional "in the sense that non compliance is an absolute bar to administrative action." *City of Allentown v. Marshall*, 657 F.2d 16, 18 (3rd Cir. 1981).

Findings of Fact and Law

In sum, case law on the issue of whether filing periods are a jurisdictional bar in employee protection provisions clarifies that filing periods are not a jurisdictional bar, which would deny the undersigned subject matter jurisdiction to hear this claim and are analogous to a Statute of Limitations. *See Donovan v. Hakner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984). This leads in to the next issue because equitable tolling is a principle applicable to Statutes of Limitations. Were the filing period deemed a jurisdictional bar, application of the doctrine of equitable tolling would not require consideration.

3. Application of the principle of equitable tolling.

Law

To reiterate, the "time limit for filing a request for a hearing is not a jurisdictional prerequisite, and is subject to the principle of equitable tolling." *Shelton*, 1995-CAA-19 (ARB March 30, 2001). In reference to the applicability of the doctrine of equitable tolling it must be noted that "[t]he time limitation period for filing an appeal in a whistleblower action is to be strictly construed." *Howlett v. Northeast Utilities Company*, 1999-ERA-1 (ALJ, December 28, 1998) (citing *Gunderson v. Nuclear Energy Services, Inc.*, 1992-ERA-48 (Sec'y, November, 19, 1993)). *See Generally*; *Degostin v. Bartlett Nuclear, Inc.*, 1998-ERA-7 (ARB, May 4, 1998);

Staskelunas v. Northeast Utilities Company, 1998-ERA-8 (ARB, May 4, 1998); *Backen v. Entergy Operations, Inc.*, 1995 ERA-44 (ALJ, June 7, 1996). The general principle mandating strict construction of filing periods in whistleblower cases will apply, unless a complainant can demonstrate the right to avail him or herself to the principle of equitable tolling. *Howlett,*1999-ERA-1 (ALJ, November 28, 1998).

It remains, at all times, within the court's or administrative agency's discretion to "relax or modify its procedural rules . . . when . . . the ends of justice require it." *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 539 (1970). There are three (3) specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases. First, where the employer has concealed or misled the employee. *City of Allentown*, 657 F.2d at 20. See *Hill v. Department of Labor*, 65 F.3d 1331,1335 (6th Cir. 1995). Second, where the employee was prevented from asserting his rights in some extraordinary way. *Id.* (quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978)). *See Crosier v. Westinghouse Hanford Company*, 1992-CAA-3 (Sec'y, January 12, 1994). Third, where the complainant raised the precise statutory claim in the wrong forum. *City of Allentown*, 657 F.2d at 20. *See Gutierrez v. Regents of the University of California*, 1998-ERA-19 (ARB, November 8, 1999).

Findings of Fact and Law

Viewed in light of the above principles, the facts of this case do not warrant application of the equitable tolling doctrine. Complainant has not alleged that Respondent Net Jets concealed or misled him. Complainant has not alleged that he was prevented from asserting his rights in some extraordinary way. The notice to file objections received by Complainant was timely, complete and adequate. Complainant did not raise his claim in the wrong forum. The doctrine of equitable tolling is a narrow and specific exception to the general rule that statutory filing periods are to be strictly construed and must be treated as such.[7]

Complainant's counsel has asserted that although, Complainant received OSHA's findings on March 14, 2003, Complainant did not inform his counsel of the same until March 24, 2003. Certainly, Complainant's failure to inform counsel was unfortunate. However, that conduct, alone, does not warrant an application of equitable tolling for two reasons. The primary reason is that the described conduct in no way fits into any of the circumscribed equitable tolling "exceptions," discussed *supra*. Secondarily, Complainant's conduct can be categorized as mistake or carelessness and "[t]he principles of equitable tolling do not extend to what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans*

[7] "Restrictions on equitable tolling must be scrupulously observed[.]" and "the tolling exception is not an open-ended invitation . . . to disregard limitations periods." *Marshall*, 657 F.2d at 20.

Affairs, 49 U.S. 89, 93 (1990), *reh'g denied,* 498 U.S. 1075 (1991).[8] Complainant failed to diligently turn OSHA's findings over to his counsel until March 24, 2003, a full ten (10) days after receipt of the same. Claimant's counsel failed to diligently file objections to OSHA's findings and insteadpushed the limits of the statutory filing period. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151 (1984).

Complainant contends that the principle of equitable tolling, if applied in this case, would in no way prejudice the Respondent. Without addressing the underlying truth or falsity of the assertion, lack of prejudice to the employer does not excuse a late filing of employee's administrative complaint. *Marshall,* 657 F.2d at 20. In *Marshall v. City of Allentown,* the Third Circuit Court of Appeals found that the Secretary of Labor erred in making lack of prejudice to the employer a determining factor in permitting employee's late filing under the employee protection provision of the Toxic Substances Control Act. *Id.*

In *Ingenfritz v. U.S. Coast Guard Academy,* equitable tolling was notapplied to an untimely filing because none of the justifications which lead to tolling of the statutory filing period were present. 1999 WPC 3 (ALJ, March 30, 1999). The presiding ALJ went on to emphasize that "[a]bsence of prejudice to respondent is not a determinant factor." *Id.* Further, the Supreme Court in *Baldwin County Welcome Center,* stated that "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply, once a factor that might justify tolling is identified, it is not an independent basis for invoking the doctrine." 466 U.S. 147. In sum, lack of prejudice to the opposing party is not a determinant factor in deciding whether equitable tolling should apply. Complainant has failed to assert facts explaining the late filing that come within any of the justifications for application of equitable tolling. As a result, he cannot use absence of prejudice as an independent basis to rationalize application of the doctrine.

CONCLUSION

29 C.F.R. §18.4(c)(3) of the ALJ Rules does not operate to allow five additional days for the mailing of an objection to OSHA's findings pursuant to 49 U.S.C. §42121(b)(2)(A) and the implementing regulations in 29 C.F.R. §1979.106(a), which mandate that objections must be filed within thirty (30) days of receipt of OSHA's findings. Timely appeal of OSHA's findings under the AIR 21 employee protection provision is not a jurisdictional prerequisite; the filing period is more closely related to a Statute of Limitations. Although principles of equitable tolling

[8] *Irwin* was cited in *Spearman v. Roadway Express,* 1992-STA-1 (Sec'y, August 5, 1992), which was based upon a commercial trucking whistleblower provision. As a result, the presiding ALJ in *Howlett v. Northeast Utilities Company,* 1999-ERA-1 (ALJ, November 28, 1998), deemed *Irwin* an appropriate precedent applicable to that case, which involved the whistleblower provision of the Energy Reorganization Act of 1974. In *Howlett,* complainant's attorney failed to timely appeal OSHA's findings because his employee misfiled the letter. *Id.* The presiding ALJ advised that such conduct was "not sufficient grounds to invoke the rarely exercised concept of equitable tolling."*Id.*

are generally applicable to whistleblower cases, the specific facts of this case do not warrant such an application.

ORDER

Respondent's Motion to Dismiss is **GRANTED** and Complainant, John Swint's claim is hereby **DISMISSED**, and the hearing scheduled for September 9, 2003, in Columbus, Ohio, is hereby **CANCELLED .**

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110(2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).